KWK (A CHILD)

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: W-05-68 & 69-2003]
22 AUGUST 2003

CRIMINAL PROCEDURE: *Sentence - Stay of execution - Pending appeal - Child offender - Special circumstances, whether must be proved - What constitutes special circumstances - Gravity of offence - Time likely to be taken for appeal to be heard - Difficult points of law - Disruption to education or schooling of child, whether an intervening factor - Child Act 2001, ss. 84(3), 95(2), s. 97(4) - Courts of Judicature Act 1964, s. 57*

CRIMINAL PROCEDURE: *Bail - Pending appeal - Child offender - Special circumstances, whether must be proved - What constitutes special circumstances - Gravity of offence - Time likely to be taken for appeal to be heard - Difficult points of law - Disruption to education or schooling of child, whether an intervening factor - Child Act 2001, ss. 84(3), 95(2), s. 97(4) - Courts of Judicature Act 1964, s. 57*

The appellant, a child within the meaning of the Child Act 2001 ('the Act'), was found guilty of murder under s. 302 of the Penal Code and was ordered to be detained at the pleasure of His Majesty the King. Pending his appeal against the said order, the appellant applied for a stay of execution. The High Court refused the application and the appellant filed the instant motion in the Court of Appeal for a stay. The grounds advanced in support of the appellant's motion were, *inter alia:* (i) that it would take at least two years for the appeal to be finally disposed of, and that this delay would make it incongruous for the Board of Visitors to make its recommendations under s. 97(4) of the Act; (ii) that the appeal involved a novel point of law respecting scientific medical-evidence, which point would likely be decided in favour of the appellant; and (iii) that the education or schooling of the appellant would be seriously disrupted if a stay was not granted. On the other hand, the respondent, having submitted that a stay of execution could

only be considered in the light of 'special circumstances', argued that there were no such special circumstances in the present case and, further, that the fact that the appellant was a child was not in itself a special circumstance in view of ss. 84(3) and 95(2) of the Act.

Held (dismissing the motion):
Per Augustine Paul JCA

[1] Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution notwithstanding the court's discretion to grant the same. The grant of a stay is only an exception to the general rule; hence, special or exceptional circumstances must be shown to exist before the discretion can be exercised in favour of a convicted applicant. (*R v. Velevski* [2000] NSWCCA 445; *Re Clarkson* [1986] VR 583 followed.) (p 61 f)

[2] The following factors may, cumulatively, constitute special circumstances to justify the grant of a stay of execution after conviction: (i) the gravity or otherwise of the offence; (ii) the length of the term of imprisonment – in comparison with the length of time likely to be taken for the appeal to be heard; (iii) whether there are difficult points of law involved; (iv) whether the applicant is a first offender or has previous convictions; (v) whether the applicant would likely be involved in another offence whilst at liberty; and (vi) whether the security imposed would ensure the attendance of the applicant before the appellate court. (pp 62 e-g & 63 a-d)

[2a] In the present case, the offence of murder for which the appellant had been convicted was a very serious one. (p 63 e)

[2b] The sentence imposed on the appellant was for an indeterminate period. Conversely, the appellant's appeal before the Court of Appeal could well be heard in about one year's time. This was not an unreasonably lengthy period. Moreover, the appellant could also apply to the President of the Court of Appeal for an earlier date of hearing. Consequently, it would be premature to conclude, at this stage, that the appeal would take a long time to be heard. (pp 64 e-h, 65 a-g & 66 a)

[2c] The point of law (respecting scientific medical-evidence) raised by the appellant was not one involving an obvious defect on the face of the record. (p 64 a-d)

[3] To place undue weight upon matters that are personal to a person who has been convicted of an offence, even though he/she is a child, is to sacrifice the 'special circumstances' that have to be proved at the altar of sympathy. In this context, the education of a child cannot be treated as having an overriding effect in an application for a stay of execution. Ultimately, there were no special circumstances to justify the grant of a stay of execution here. (pp 66 b-h & 67 a-d)

[Stay of execution refused.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu, seorang kanak-kanak dalam erti-kata Akta Kanak-Kanak 2001 ('Akta'), telah didapati bersalah kerana membunuh di bawah s. 302 Kanun Keseksaan dan telah diperintahkan untuk ditahan di bawah kuasa Raja. Sementara menunggu rayuan beliau terhadap perintah tersebut, perayu telah memohon penggantungan perlaksanaan. Mahkamah Tinggi menolak permohonan tersebut dan perayu memfailkan usul ini di Mahkamah Rayuan untuk penggantungan. Alasan-alasan yang diutarakan untuk menyokong usul perayu adalah, *inter alia*: (i) bahawa ianya akan mengambil masa sekurang-kurangnya dua tahun untuk rayuan tersebut diselesaikan, dan bahawa kelewatan ini akan menjadi satu ketidaksesuaian bagi Lembaga Pelawat untuk membuat cadangan-cadangannya dibawah s. 97(4) Akta; (ii) bahawa rayuan ini melibatkan satu perkara undang-undang yang baru berhubung dengan sains keterangan perubatan, yang mana perkara ini mungkin diputuskan memihak kepada perayu; dan (iii) bahawa pelajaran ataupun persekolahan perayu akan terhalang secara serius jika penggantungan tidak dibenarkan. Sebaliknya, pihak responden, setelah berhujah bahawa penggantungan perlaksanaan hanya dapat dibenarkan dalam 'keadaan-keadan yang istimewa', menyatakan bahawa tidak terdapat sebarang keadaan-keadaan yang istimewa dalam kes semasa ini dan, selanjutnya, bahawa fakta bahawa perayu seorang kanak-kanak bukanlah satu keadaan yang istimewa di bawah ss. 84(3) dan 95(2) Akta.

Diputuskan (menolak usul):
Oleh Augustine Paul HMR

[1] Seksyen 57 Akta Mahkamah Kehakiman 1964 memperuntukkan bahawa sesuatu rayuan tidak akan menjadi satu penggantunggan perlaksanaan walaupun mahkamah mempunyai budibicara untuk membenarkannya. Kebenaran penggantunggan hanyalah satu pengecualian kepada kaedah am; dengan itu, keadaan-keadaan yang istimewa atau luarbiasa hendaklah dibuktikan wujud sebelum budibicara yang memihak kepada pemohon yang telah disabit digunakan. (*R lwn. Velevski* [2000] NSWCCA 445; *Re Clarkson* [1986] VR 583 diikuti.)

[2] Faktor-faktor berikut mungkin, secara keseluruhannya, merupakan keadaan istimewa bagi menjustifikasikan kebenaran penggantungan perlaksaan selepas sabitan: (i) keberatan atau keringanan kesalahan; (ii) jangkamasa penjara – berbanding dengan jangkamasa rayuan mungkin didengar; (iii) sama ada melibatkan perkara-perkara undang-undang yang sulit; (iv) sama ada yang tertuduh adalah pesalah yang pertama ataupun telah mempunyai sabitan-sabitan terdahulu; (v) sama ada yang tertuduh mungkin terlibat dengan kesalahan yang lain jika beliau bebas; dan (vi) sama ada sekuriti yang dikenakan akan menjamin kehadiran pemohon di hadapan mahkamah rayuan.

[2a] Dalam kes semasa, kesalahan membunuh yang mana perayu telah disabitkan adalah merupakan satu kesalahan yang serius.

[2b] Hukuman yang dikenakan terhadap perayu adalah untuk satu jangkamasa yang tidak dapat dipastikan. Sebaliknya, rayuan perayu di hadapan Mahkamah Rayuan ini mungkin dapat didengar dalam masa satu tahun. Ini bukanlah satu jangkamasa yang tidak wajar. Tambahan pula, perayu juga dapat memohon kepada Presiden Mahkamah Rayuan untuk satu tarikh pembicaraan yang awal. Oleh yang demikian, ianya adalah pramatang untuk memutuskan, pada tahap ini, bahawa rayuan tersebut akan mengambil masa yang lama untuk didengar.

[2c] Perkara undang-undang (berhubung dengan sains keterangan perubatan) yang telah dibangkitkan oleh perayu bukanlah sesuatu yang melibatkan kecacatan yang nyata pada rekod.

[3] Untuk memberikan tumpuan yang tidak wajar ke atas perkara-perkara yang bersifat peribadi kepada seseorang yang telah disabit dengan satu kesalahan, walaupun beliau merupakan seorang kanak-kanak, akan mengorbankan keadaan-keadaan istimewa yang perlu dibuktikan atas dasar simpati. Dalam konteks ini, pembelajaran seorang kanak-kanak tidak dianggap mempunyai kesan yang utama dalam satu permohonan untuk penggantungan perlaksanaan. Akhirnya, tidak terdapat sebarang keadaan yang istimewa bagi menjustifikasikan kebenaran penggantungan perlaksanaan di sini.

Case(s) referred to:
Babu Singh & Ors v. State of Uttar Pradesh AIR [1978] SC 527 ***(refd)***
Director of Public Prosecutions of Jamaica v. Mollison [2003] 2 WLR 1160 ***(refd)***
Ganesan v. PP [1983] 2 MLJ 369 ***(refd)***
Goh Beow Yam v. R [1956] MLJ 251 ***(refd)***
Kashmira Singh v. State of Punjab AIR [1977] SC 2147 ***(refd)***
R v. Gruffydd [1972] 56 Cr App R 585 ***(refd)***
R v. Velevski [2000] NSWCCA 445 ***(foll)***
R v. Watton [1978] 68 Cr App R 293 ***(refd)***
Ralph v. PP [1972] 1 MLJ 242 ***(refd)***
Re v. Velevski [2000] NSWCCA 445 ***(refd)***
Re Clarkson [1986] VR 583 ***(foll)***
Re Jackson [1997] 2 VR 1 ***(refd)***
Re Kwan Wah Yip & Anor [1954] MLJ 146 ***(refd)***
Re Pennant [1997] 2 VR 85 ***(refd)***
Shaikh Karim & Ors v. Emperor AIR [1921] Nag 279 ***(refd)***
Yusof Mohamed v. PP [1995] 3 MLJ 66 HC ***(refd)***

Legislation referred to:
Child Act 2001, ss. 84(3), 95(2), (3), 97(2), (4)
Courts of Judicature Act 1964, s. 57
Federal Constitution, art. 8(1)
Penal Code, s. 302
Rules of the Court of Appeal 1994, r. 22

Other source(s) referred to:
John B Bishop, *Criminal Procedure*, 2nd edn, p 241
MR Mallick, *Bail: Law and Practice*, 3rd edn, p 175

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Vong Poh Fah (Mohd Dusuki Mokhtar)

Reported by Gan Peng Chiang

JUDGMENT

Augustine Paul JCA:

KWK ("the subject"), a child within the meaning of the Child Act 2001 ("the Act"), was found guilty of an offence of murder under s. 302 of the Penal Code on 1 July 2003. The sentence to be imposed was deferred to another date pending the production of a probation report. On 24 July 2003 the subject was ordered to be detained at the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Act. Notices of appeal were filed against the orders made. An application for a stay of execution made in the High Court was dismissed on 7 August 2003. The subject then filed a motion for stay of execution ("the motion") in the Court of Appeal on 11 August 2003 which was heard on 18 August 2003.

At the hearing before us learned counsel for the subject advanced several grounds in support of the motion. Firstly, he argued that it will take time for the appeal to be heard. He further said that at the moment there are 175 criminal appeals ready for hearing in the Court of Appeal. With a further right of appeal to the Federal Court in this case it would take at least two years for the appeal to be finally disposed of. He argued that this delay will make it incongruous for the Board of Visitors to make their recommendation as provided by s. 97(4) of the Act. This is because it would be difficult for them to comply with s. 97(4) of the Act when the appeal has not been finally determined. Secondly, he said that this appeal involves a novel point of law as stated in para. 9.1 of his affidavit. It reads as follows:

> Terdapatnya isu-isu perundangan yang baru di dalam rayuan yang berkemungkinan besar akan dibenarkan oleh Mahkamah Rayuan berpihak kepada penama di atas, khususnya penolakan keterangan saksi pembelaan, Tan Sri Dato' Seri Dr M Mahadevan yang merupakan keterangan saintifik dan sepatutnya diterima dan aplikasi ujian orang waras ('reasonable man test') berhubung dengan pembelaan provokasi memandangkan penama di atas adalah seorang kanak-kanak. Salah arahan-salah arahan tersebut adalah 'fundamental' dan menyebabkan rayuan kepada Mahkamah Rayuan penama di atas bermerit. Tambahan pula, peruntukan-peruntukan seksyen 97(4) Akta Kanak-Kanak 2001 terhadap penangguhan perlaksanaan dan jaminan adalah bertentangan dengan penolakan penangguhan perlaksanaan dan jaminan setelah penama di atas telahpun menggunapakai hak rayuannya ke Mahkamah Rayuan, dan sekiranya beliau gagal dalam permohonannya tersebut, untuk merayu secara akhir ke Mahkamah Persekutuan memandangkan penama di atas tidak dihukum mati tetapi untuk penjara selama yang diperkenankan oleh Yang di-Pertuan Agong.

Thirdly, he argued that the education of the subject will be seriously hampered if he is not allowed a stay of execution. He advanced several reasons in support of this ground. He also said that the prison does not have facilities for the subject to continue his education effectively. The probation report on the subject is also favourable to him. The subject is also a first offender and there is no possibility of him being involved in similar or other offences. Learned counsel added that this court may impose the same conditions, or even stricter ones, as those imposed by the High Court when the subject was enlarged on bail when he was charged. In his reply the learned Deputy Public Prosecutor said that the court has a discretion to order a stay of execution only where there are special circumstances. The reply of the prosecution to learned counsel's argument on the point of law involved is contained in an affidavit affirmed by the Deputy Public Prosecutor who conducted the trial of the subject. It reads as follows:

> Bahawa soal undang-undang yang baru ditimbulkan berkaitan keterangan Tan Sri Dato' Seri M Mahadevan bukanlah merupakan soal undang-undang yang baru dan tidak ada salah arah oleh Yang Arif Hakim berkaitan penerimaan saintifik dan aplikasi ujian orang waras (reasonable man test) dari segi pembelaan provokasi memandangkan pemohon adalah seorang kanak-kanak. Yang Arif Hakim telah menyatakan secara panjang lebar alasan mengapa keterangan tersebut ditolak di dalam penghakimannya. Saya percaya rayuan dalam perkara ini ke Mahkamah Rayuan adalah tidak bersifat fundamental dan bermerit. Keterangan kes pendakwaan semasa perbicaraan di Mahkamah Tinggi adalah berdasarkan keterangan secara terus dan ikut keadaan. Keterangan ikut keadaan ini pula adalah 'overwhelming' untuk mengaitkan bahawa pemohon yang membunuh si mati. Secara keseluruhannya, terdapat keterangan yang melampaui keraguan yang munasabah yang menunjukkan pemohon membunuh si mati.

The learned Deputy Public Prosecutor said that any error of law must be one that is apparent on the face of the record and in this case it is not so. He said that without the notes of proceedings and grounds of judgment it is not possible to make a ruling on the objection raised by learned counsel. With regard to the number of cases which are ready for hearing in the Court of Appeal he said that many cases are disposed of everyday and that there is nothing to prevent the subject from requesting for an early hearing date. In answer to learned counsel's argument based on s. 97(4) of the Act he said that if a stay of execution is granted it will mean that the Board of

Visitors will not be able to undertake a review. With regard to the facilities for the education of the subject in prison he said that special arrangements have been made to ensure that the subject's education is not neglected. Some affidavits were tendered in support. We refer, first, to the affidavit affirmed by Hajjah Siti Zaharah binti Aman, a District Education Officer, who averred in para. 4:

> Pejabat ini telah menerima sepucuk surat dari pihak Penjara Kajang bertarikh pada 26 Julai 2003 di mana mereka memohon jasabaik dari pejabat ini untuk menghantar salah seorang dari pegawai kami untuk hadir ke institusi mereka bagi membincangkan soal pendidikan dan pembelajaran bagi pemohon tersebut yang kini ditahan selama yang diperkenankan oleh Yang Di Pertuan Agong.
>
> Oleh itu, saya sendiri telah berbincang dengan pihak Pengarah Penjara tersebut pada 30 Julai 2003 untuk menyelaras dari segi bantuan dan sumbangan yang boleh diberikan oleh pejabat ini kepada pemohon.
>
> Saya dengan sesungguhnya menyatakan bahawa pejabat ini telah bersetuju untuk membekalkan secara percuma bahan-bahan seperti sukatan pelajaran, senarai buku-buku teks serta buku rujukan dan panduan mengenai pembelajaran peringkat menengah secara percuma kepada pemohon. Bahan-bahan tersebut akan dihantar kepada pihak penjara secepat mungkin untuk kegunaan pemohon.
>
> Pejabat ini seterusnya akan membekalkan buku-buku teks di bawah Skim Pinjaman Buku Teks jika pemohon memohon dan didapati layak untuk mendapatkan kemudahan tersebut.
>
> Saya juga menyatakan bahawa pihak Kementerian Pendidikan telah mengarahkan pejabat ini melalui surat bertarikh 28 Julai 2003 untuk menyediakan seorang guru dari sekolah menengah yang berhampiran dengan penjara tersebut hadir untuk memberi bimbingan selama dua jam seminggu dengan pemohon selama dia ditahan di penjara sehingga mendapat perkenan Yang Di Pertuan Agong. Ini untuk membolehkan pemohon menerima pendidikan menengah semasa beliau di dalam penjara. Bimbingan yang akan diberikan adalah berbentuk tunjuk ajar berkait soal pembelajaran serta pendidikan menengah, 'student-teacher contact' dan perkara-perkara lain yang berkaitan.
>
> Kami telah sekali lagi mengadakan mesyuarat dengan pihak Pengarah Penjara Kajang pada 13 Ogos 2003 bagi menyelaraskan soal penyediaan guru tersebut serta perkara-perkara lain yang berkaitan. Pejabat ini telah menyediakan empat orang guru dari beberapa sekolah yang berhampiran

untuk memberi bimbingan kepada pemohon tersebut. Mereka akan memberi bimbingan dan tunjuk ajar kepada pemohon secara bergilir-gilir selama dua jam setiap minggu pada hari persekolahan. Ianya akan bermula pada 18 Ogos 2003.

Saya juga diberi faham bahawa pemohon berminat untuk meneruskan program pembelajaran E-Learning dan A Score yang diperkenalkan oleh guru tuisyennya dan pejabat ini akan membantu guru tersebut jika diminta.

Saya juga ingin menyatakan bahawa kemudahan untuk pemohon menduduki peperiksaan seperti Peperiksaan Menengah Rendah dan Sijil Pelajaran Malaysia serta ujian lisan akan disediakan oleh pejabat ini di mana pegawai akan dihantar ke penjara untuk menyelaras peperiksaan tersebut serta membolehkan pemohon mendudukinya di dalam penjara berkenaan.

Azman bin Muda, a senior Prisons Officer, averred in para. 4 of his affidavit as follows:

Pihak penjara telah menghantar satu surat bertarikh 26 Julai 2003 kepada pihak Pegawai Pendidikan Daerah (PPD) Hulu Langat, Selangor bagi memohon jasa baik pihak PPD untuk menghantar pegawai ke pejabat kami bagi membincangkan soal pendidikan dan pembelajaran pemohon. Surat tersebut dilampirkan dan ditandakan sebagai Eksibit 'AM-1'.

Dalam mesyuarat yang diadakan pada 30 Julai 2003, pihak PPD Hulu Langat tersebut telah secara dasarnya bersetuju untuk memberi bantuan bahan pembelajaran dalam bentuk sukatan pelajaran, senarai buku bacaan serta buku rujukan dan panduan pembelajaran bagi peringkat menengah bagi membolehkan pemohon mendapat kemudahan pembelajaran semasa ditempatkan di penjara ini. Selain itu, mereka juga akan memberi bantuan seorang guru dari sekolah yang terdekat yang akan datang ke penjara untuk tempoh dua jam seminggu pada hari persekolahan bagi tujuan memberi bimbingan kepada pemohon. Seterusnya satu mesyuarat telah diadakan dengan pihak PPD Hulu Langat pada 13 Ogos 2003 untuk menyelaraskan penyediaan guru tersebut dan seramai 4 orang guru telah disediakan bagi tujuan yang tersebut. Mereka akan mula hadir ke penjara secara bergilir-gilir selama dua jam seminggu untuk memberi bimbingan dan tunjuk ajar kepada pemohon mulai pada 18 Ogos 2003.

Saya sesungguhnya juga menyatakan bahawa saya telah bercakap dengan pemohon mengenai teknik pembelajaran E-School On Line dan program A-Score yang diperkenalkan oleh guru tuisyennya di rumah di mana beliau ingin meneruskan program pembelajaran tersebut di penjara. Jabatan ini telah menyediakan peralatan komputer dan sedang menyediakan talian internet bagi kemudahan pemohon mengikut program tersebut.

Saya juga telah menyediakan tempat yang sesuai di penjara ini untuk dijadikan kelas bagi program berkenaan khusus untuk pemohon mengikutinya. Di samping itu, satu tempat juga telah disediakan untuk dijadikan perpustakaan bagi tujuan yang tersebut. Sementara itu pihak penjara juga telah membekalkan buku-buku bacaan dan buku teks untuk kegunaan pemohon.

Saya juga ingin menyatakan pihak penjara tidak akan menghalang sama sekali kedua ibu-bapa dan anggota keluarga pemohon untuk datang melawat, membekalkan apa-apa alat pembelajaran yang sesuai, memberi bahan-bahan bacaan kepada pemohon dan membawa guru tuisyennya bagi memberi bimbingan dan tunjuk ajar kepada pemohon di penjara. Malah pihak penjara bersedia untuk membuat jadual lawatan harian yang khusus untuk membolehkan guru tuisyen pemohon datang ke penjara bagi tujuan yang tersebut.

Jadual lawatan oleh kedua ibu-bapa dan keluarga pemohon juga sedia untuk diatur sekiranya mereka memohon untuk membuat lawatan yang lebih kerap bagi tujuan melawat pemohon di penjara. Ini untuk memastikan hubungan kasih sayang serta kekeluargaan kedua ibu-bapa dan keluarga pemohon dengan tidak terputus.

The learned Deputy Public Prosecutor concluded by arguing that the fact that the subject is a child is not a special circumstance in view of ss. 84(3) and 95(2) of the Act. In his reply learned counsel said that an early hearing date for the subject over other cases that are pending will result in an infringement of art. 8(1) of the Federal Constitution.

Before we consider the submissions made by both parties it is perhaps necessary to consider the applicable law.

Bail in the case of persons awaiting trial and in the case of persons after their conviction entail different considerations. As Spenser Wilkinson J said in *Re Kwan Wah Yip & Anor* [1954] MLJ 146 at p. 147:

Entirely different considerations arise after trial and in my opinion once a person has been convicted by a court of competent jurisdiction it must be assumed, in the absence of any obvious defect on the face of the record, that he has been rightly convicted unless and until the conviction is set aside.

As Barr J said in *R v. Velevski* [2000] NSWCCA 445:

> It has long been the common law (which is now excluded in this state by the Bail Act, s. 67) that bail will not be granted to a person convicted of an offence pending the hearing of an appeal against his conviction unless special or exceptional circumstances are shown by him to exist. This is a recognition by the common law of the fact that the applicant for bail has already been tried and convicted and no longer has any presumption of innocence in his favour. The common law accepts that such conviction results from a trial which must be taken, until the contrary is shown, to have been properly conducted and without error of law: *R v. Southgate* [1960] 78 WB (NSW) 44 at 44. To grant bail pending an appeal from that conviction is to whittle away the finality of the jury's verdict and to invest it with a provisional quality, thus attacking the central feature in the administration of criminal justice: *Chamberlain v. The Queen (No 1)* [1983] 153 CLR 514 at 519 – 520. The common law sees strong social reasons why an appellant's hopes should not be raised by the grant of bail for, if unsuccessful in his appeal, he will suffer all the more when those hopes are dashed and he is returned to custody to serve the sentence previously imposed upon him: *R v. Gruffydd* [1972] 56 Cr App R 585 at 589. There are also practical reasons for the common law's view that bail should be less readily available after conviction. These were referred to by King CJ in *R v. Giordano* [1982] 31 SASR 241 at 242; 6 A Crim R 397 at 398-399, and have been quoted by the Chief Justice in his judgment in the present application.

Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution though the court has a discretion to grant a stay. As the grant of a stay is only an exception to the general rule there must be special or exceptional circumstances before the discretion can be exercised in favour of an applicant. In commenting on proof of special circumstances Murray, Brooking and Vincent JJ said in *Re Clarkson* [1986] VR 583 at pp. 584-585:

> In our view there is no difference between the approach of those who have spoken in terms of very exceptional circumstances and those who have referred only to special or exceptional circumstances. If the principle that special or exceptional circumstances must be shown to warrant admitting a prisoner to bail pending appeal is regarded as meaning only that the applicant bears a burden and must put forward, as justifying the grant of bail, something that is not present in most or all cases, then the statement of principle has failed adequately to convey the practice of the court and the principle on which it acts. It is probably for this reason that judges have on occasions expressed the requirement as one of 'very' exceptional

circumstances. The adverb reflects the difficulty of persuading the court that the circumstances put forward as special or exceptional are strong enough to overcome the powerful considerations of a general character which militate against the grant of bail pending appeal. So strong are these considerations that it has been said that extreme caution must be exercised before bail is granted: *R v. Giordano* [1982] 31 SASR 241; *Re Maher* (unreported, Full Court of Queensland, 18 November 1985). Indeed in England the Court of Appeal has gone so far as to say that the application will succeed only if the court is driven to the conclusion that justice can only be done by the granting of bail: *R v. Watton* [1978] 68 Cr App R 293, at p. 297. The powerful considerations, relating principally, but not exclusively, to the public interest, which will ordinarily induce the court to refuse bail pending appeal have been examined in recent pronouncements of the Full Courts of South Australia and Queensland in Giordano's Case and Maher's Case and by Brennan J in *Chamberlain v. R (No 1)* [1983] 153 CLR 514; 46 ALR 608, see further the observations of Sugarman J in *R v. Southgate* [1961] 78 WN (NSW) 44, where his Honour referred to the appellant's guilt as established by the verdict of a jury in what must be taken, until the contrary was shown, to have been a trial properly conducted and without error of law.

The factors that may constitute special circumstances to justify the grant of a stay of execution after conviction are well settled (see, for example, *Re Kwan Wah Yip & Anor* [1954] MLJ 146; G*anesan v. PP* [1983] 2 MLJ 369; *Yusof bin Mohamed v. PP* [1995] 3 MLJ 66; *Ralph v. PP* [1972] 1 MLJ 242). They can be enumerated as follows:

(a) the gravity or otherwise of the offence;

(b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;

(c) whether there are difficult points of law involved;

(d) whether the accused is a first offender or has previous convictions;

(e) whether the accused would become involved again in another offence whilst at liberty;

(f) whether the security imposed will ensure the attendance of the appellant before the Appellate Court.

This list is not exhaustive (see *Goh Beow Yam v. R* [1956] MLJ 251). A matter of some concern is whether these conditions are also applicable in the case of a child. The learned Deputy Public Prosecutor submitted that even in the case of a child an appeal does not operate as a stay of execution as provided by s. 95(2) of the Act. This, in our opinion, means that even a child must justify his application for the grant of a stay of execution pending appeal with special circumstances. We pause to add that no single factor enumerated earlier can have a determinative effect on the decision to be made. It is the cumulative effect of all the factors that matters. However, we do bear in mind the strong social reasons why an appellant's hopes should not be raised by the grant of bail for, if unsuccessful in his appeal, he will suffer all the more when those hopes are dashed and he is returned to custody to serve the sentence previously imposed upon him (see *R v. Gruffydd* [1972] 56 Cr App R 585). This only means that extreme care must be exercised in dealing with an application for a stay of execution.

In this case it is clear that the subject is a first offender. His probation report is favourable to him. But these are only some of the factors that must be considered. There are other, and more significant, factors for deliberation which we will now do so.

(a) Gravity Or Otherwise Of The Offence

There can be no dispute that the offence of murder under s. 302 of the Penal Code for which the subject has been found guilty is a very serious one indeed. However, we are not suggesting that in very serious offences, as the one in this case, there can be no stay. What we do say is that the graver the offence the less likely it may be for the discretion to be exercised in favour of a stay. In this regard we refer to *Criminal Procedure* by John B Bishop 2nd edn which says at p. 241:

> The gravity of the offence with which an applicant for bail is charged has always been regarded as an important matter to be taken into consideration. In practice, it is the first matter that a court considers. Put simply, the more serious the offence the weaker the presumption in favour of bail; and, conversely, the less serious the offence the stronger the presumption in favour of bail.

(b) Whether There Are Difficult Points Of Law Involved

In *R v. Southgate* [1960] 78 WB (NSW) 44 it was held that a conviction resulting from a trial must be taken, until the contrary is shown, to have been properly conducted and without error of law. The error, if any, must be an obvious defect on the face of the record (see *Re Kwan Wah Yip & Anor* [1954] MLJ 146). It must have an extraordinarily high prospect of success and must be one which can be seen without detailed argument to be certain to succeed (see *R v. Velevski* [2000] NSWCCA 445). That is logical as otherwise a bail application will end up as the hearing of an appeal and lead to the pre-judgment of contested issues. As submitted by the learned Deputy Public Prosecutor the records are not before the court. It is therefore not possible for us to be in a position to detect any error. In any event the point of law raised by learned counsel is one that requires detailed argument and is not one which is an obvious defect on the face of the record. It is therefore one that cannot be considered now for the purpose of the motion. For the same reason we are unable to consider the case of *Director of Public Prosecutions of Jamaica v. Mollison* [2003] 2 WLR 1160 submitted by the defence at the last minute in support of an argument that s. 97(2) of the Act is unconstitutional.

(c) The Length Of The Term Of Imprisonment In Comparison With The Length Of Time Which Is Likely To Take For The Appeal To Be Heard

The likelihood that an applicant will have served the whole or a very substantial part of the sentence before his appeal is heard is often regarded as sufficient to satisfy the requirement of special circumstances; always depending on the nature of the offence and other attendant factors (see *Re Jackson* [1997] 2 VR 1). The sentence imposed on the subject in this case is for an indeterminate period. It is dependent on the recommendation that may be made by the Board of Visitors pursuant to s. 97(4) of the Act. It is therefore not possible to predict the length of the subject's detention. Therefore, what is more significant in this case is the length of time that is likely to take for the appeal to be heard. In cases such as *Kashmira Singh v. State of Punjab* AIR [1977] SC 2147 and *Babu Singh & Ors v. State of Uttar Pradesh* AIR [1978] SC 527 it was held that so long as the court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent reasons for acting otherwise, release the accused on bail. In this regard we must confine ourselves only to the length of time that will take for the appeal to be heard in the Court of Appeal. We cannot take into account the further time that will be taken for the appeal to be heard in

the Federal Court. If we do so it will be tantamount to a stay being granted at this stage for the hearing of the appeal in the Federal Court in the future as well.

We accept the fact that there are 175 criminal appeals which are ready for hearing in the Court of Appeal. We are unable to say when the appeal of the subject will be heard. From our experience, however, we can safely say that it may take about a year or so for a criminal appeal from the High Court to be heard. That cannot be said to be an unreasonable period of time to wait for the hearing of the appeal. Be that as it may, the subject may also apply to the President of the Court of Appeal for an early hearing date who may, perhaps, be guided by s. 95(3) of the Act which provides that the High Court shall, in all criminal appeals originating from a Court for Children, make its final decision within twelve months after the notice of appeal has been filed. This will not, as contended by learned counsel, conflict with art. 8(1) of the Federal Constitution. Rule 22 of the Rules of the Court of Appeal 1994 specifically empowers the President of the Court of Appeal to order the early hearing of an appeal. In any event, it must be observed that in this case the decision against the subject was only made in July 2003. The record of appeal must be in the midst of preparation now. The appeal to the Court of Appeal is therefore at a very early stage; it is difficult to say how fast the appeal will take to be heard; and as far as we know no application has been made to the President of the Court of Appeal for an early hearing date. In the circumstances it would be speculative and premature to say that the appeal will take a long time to be heard. This reasoning militates against the grant of a stay. In support we refer to *Bail: Law and Practice* by MR Mallick 3rd edn where it says at p. 175:

> The Division Bench has found that the accused persons have been sentenced to life imprisonment only on 12th November 1997 and has preferred appeal in January 1998 and it is not a case in which they have served out 5 or 6 years in imprisonment or a major part of life imprisonment, that it is premature to say that the appeal will not be heard within a reasonable period of time and that it is premature to consider his release on bail on the ground that there would be delay in hearing the appeal specially when the charges against them are grave in nature (*Yusuf Gain v State of WB Cal* LT [1998] (2) HC 588).

In our opinion therefore it is premature to consider the question of the length of time it will take for the appeal in this case to be disposed of at this stage.

The objection of learned counsel grounded on s. 97(4) of the Act is devoid of any merit. We do not see how the Board of Visitors will be hampered from carrying out its functions even if the appeal is pending. In our opinion they can continue to function at this stage and may even recommend that the subject be released. On the contrary if the subject is released on bail now his rights under s. 97(4) of the Act will be delayed. This will be prejudicial to an earlier release of the subject. The effect that the detention will have on the education of the subject warrants consideration. It must be observed that the Act which was promulgated to ensure the care, protection and rehabilitation of children itself provides, by its s. 95(2), that an appeal shall not operate as a stay of execution unless it is otherwise ordered. This means that there may be instances when a stay of execution shall not be granted to a child. It would obviously be for the reason that in such cases the other circumstances must prevail over the interests of a child. This in turn would mean that the Act must have in contemplation the fact that when a stay of execution is not granted there will necessarily be a disruption in the normal life of a child which would include his education. The education of a child cannot therefore be treated as having an over-riding effect in an application for stay. This brings into focus the principle enunciated in *Ralph v. PP* [1972] 1 MLJ 242 pursuant to which personal problems of a person are only matters that arouse sympathy for him. This is illustrated in *Shaikh Karim & Ors v. Emperor* AIR [1921] Nag 279 where it was held that the mere previous respectability of a person is *per se* no sufficient reason for giving bail when he has been convicted of a criminal offence. Similarly it was held in *Re Pennant* [1997] 2 VR 85 that the fact that a convicted person's wife was wheelchair-bound and was due to have an operation on a spinal tumour is only provocative of sympathy. In *R v. Watton* [1978] 68 Cr App R 293 Geoffrey Lane LJ said at pp. 294-295:

> … What the appellant puts forward as exceptional circumstances are first, that he himself is not fit; secondly, that his wife suffers from angina and is under medication constantly; thirdly, that he has the misfortune to have a daughter who is mentally unstable and looks to the appellant, her father, for a great deal of her companionship and support. Next it is said that he was not expecting to go to prison and therefore had not taken the necessary steps to put his affairs in order before he went to prison. Then

it is said that the Christmas holidays are coming up and finally, he is of good character to all intents and purposes. Those are the matters which have been urged upon us as exceptional circumstances. We do not think they are.

Undue weight given to matters that are personal to someone, even though a child, found guilty of an offence would mean that the special circumstances to be proved have been sacrificed at the altar of sympathy. Of course they can be considered in favour of a person if the other circumstances of the case are also tilted towards him which is not so in this case. The subject has failed to establish the existence of special circumstances in his favour. Thus the disruption of the education of the subject cannot have an over-riding effect on the facts of this case. In any event the affidavits filed by the learned Deputy Public Prosecutor indicate that the authorities concerned are taking every reasonable step to ensure that the educational requirements of the subject are favourably met.

We therefore hold that there are no special circumstances to justify the grant of a stay of execution in this case. Accordingly we dismiss the motion.